No. 17-965

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American-Arab Anti-Discrimination Committee (ADC) is a nonprofit, grassroots civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Founded in 1980 by U.S. Senator James Abourezk, ADC is non-sectarian and non-partisan. With members from all fifty states and chapters nationwide, it is the largest Arab-American grassroots organization in the United States. ADC protects the Arab-American and immigrant communities against discrimination, racism, and stereotyping, and it vigorously advocates for immigrant and civil rights.[1]

Presidential Proclamation 9645[2] places a significant and undeserved burden on ADC and its members. It indefinitely bans from entry into the United States immigrants who are nationals of six Muslim-majority nations: Iran, Libya, Somalia, Syria, Yemen, and Chad. Proclamation 9645 also significantly limits or bans the entry of non-immigrants who are nationals of these six nations. J.A. 135; *see also* Pew Research Center, *The Global Religious Landscape: A Report on the Size and Distribution of the World's Major Religious Groups as*

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[1] ADC certifies that all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

[2] Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161, 45,161 (Sept. 24, 2017) (hereinafter "Proclamation 9645").

of 2010, 46 (2012).[3] Four of these nations are majority-Arab,[4] and the other two have significant Arab minority populations.[5] Proclamation 9645 also affects nationals of two non-Muslim-majority nations: all nationals of North Korea and certain specific individuals who are Venezuelan nationals. However, the overwhelming majority of individuals harmed by Proclamation 9645 are nationals of Muslim- and Arab-majority nations, as was the case with the President's earlier efforts to prevent Muslims and Arabs from entering the United States.[6]

ADC has worked with thousands of its U.S.-resident and U.S.-citizen members affected by Proclamation 9645. For example, ADC has assisted M.B., an Iranian national who seeks to enter the United States, in consultation with one of its U.S. members. M.B. holds a bachelor's degree in applied mathematics and a master's degree in commercial marketing. She also practices a form of Islam that focuses on mysticism. The Iranian regime strongly disfavors her belief system, so much so that the mystic under whom M.B. studied has been sentenced to death for his beliefs, none of which are rooted in violence or

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[3] *Available at* http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/.

[4] Libya, Somalia, Syria, and Yemen.

[5] Iran and Chad.

[6] Plaintiffs do not challenge the provisions of Proclamation 9645 that apply to North Korea and Venezuela. *See Hawaii* v. *Trump*, 859 F.3d 741, 756 (9th Cir. 2017) (hereinafter "Ninth Circuit Op."). Proclamation 9645 follows two executive orders that exclusively banned entry by nationals of certain majority-Muslim nations. Executive Order 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) ("January Order"); Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("March Order").

terror. Four other students of the same mystic were imprisoned and lashed, solely for their beliefs. M.B. lives in fear of the same fate, and she has provided U.S. authorities with documentation to verify her claims.

In 2017, M.B. received notification from the U.S. Department of State that she had been granted a visa through the diversity visa lottery. However, due to Proclamation 9645 and its predecessors, M.B. has not actually received her visa. M.B. does not have a familial connection to the United States, so she has not benefited from the various court orders enjoining the application of Proclamation 9645 and its predecessors to individuals who have a bona fide connection to the United States. She applied for, but has not received, a waiver.

As another example, ADC has assisted M.A., a U.S. citizen whose wife is a Yemeni national. M.A. is a doctor at a hospital in Arkansas, and he has been separated from his wife for nearly two years. His wife is chronically ill with mitral valve rheumatic heart disease. She needs regular and consistent medical care that is available in the United States (and, indeed, in M.A.'s own hospital) but unavailable in Yemen. Without proper treatment, she could suffer heart failure, cardiac arrhythmia, or death.

M.A. applied for the immigration of his wife as an immediate relative, pursuant to an I-130 Petition for Alien Relative. The U.S. Embassy in Yemen declined to process the application not on the merits but because M.A.'s wife is a national of Yemen, citing Proclamation 9645—even though the petition included details regarding her bona fide connection to her U.S. citizen husband. M.A.'s wife then filed for a waiver of Proclamation 9645 based on urgent medical

need. Despite his clear connection to his wife and the fact that every day of delay puts her life at risk, M.A.'s wife has not received a waiver. These examples are two of many.

Moreover, Proclamation 9645 was intended to have, and has had, the effect of branding Islam as a dangerous religion and making clear that Muslims are not fully welcome in the United States. Plainly, this harms Muslim-American Arabs. But it also harms American Arabs who are not Muslim. Americans frequently conflate Arabic ethnicity with belief in Islam, despite the fact that most Muslims are not Arab. Accordingly, Arab-Americans, regardless of faith, suffer from the effects of a government-sanctioned message that Muslims are threatening and un-American. ADC therefore urges the Court to uphold the Ninth Circuit's preliminary injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before turning to the constitutionality of Proclamation 9645, the Court should consider whether the Proclamation is a lawful exercise of the President's authority under the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(f). It is not. The Court could reach this conclusion by looking to the text, legislative history, and prior executive interpretations of § 1182(f), as the Ninth Circuit did. However, another source of authority also compels the conclusion that Proclamation 9645 exceeds the President's authority under the INA: the Religious Freedom Restoration Act (RFRA).

In passing RFRA, Congress revoked any prior authority the President may have had under § 1182(f)

to take any action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability," unless he can show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Under this test, Proclamation 9645 is unlawful if it disfavors belief in Islam. History shows that laws designed to single out and discriminate against members of a minority religion almost always serve their intended purpose, and then some. Accordingly, Section 1182(f) bars the President from banning individuals from entering the United States because they are likely to be Muslim.

Ordinarily, courts may have no reason to believe that religious animus underlies a presidential proclamation when it is facially neutral with respect to religion. But the specific history behind Proclamation 9645 and the discriminatory manner in which it operates require the Court to examine whether the President is telling the truth about why he adopted the Proclamation, or if his purported national security rationale shelters the primary motive: reducing the number of immigrants who believe in Islam.

The President based Proclamation 9645 on his prior January and March Executive Orders. And the President's own extraordinary statements demonstrate that he designed all three orders specifically to keep Muslims out of America. *See Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554 (4th Cir.), *vacated and remanded*, No. 16-1436, 2017 WL 4518553 (U.S. 2017). In describing his plans for future immigration policy, Candidate Trump

promised "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." J.A. 158. He made his animus for Muslims inside and outside of the U.S. clear, stating in public interviews that "Islam hates us [and] . . . we can't allow people coming into the country who have this hatred," and, "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 120-121, 164.

Almost immediately after taking office, President Trump signed the January Order, which both imposed a temporary travel ban and set the criteria officials should examine when designing a permanent travel ban, without consulting any government national security experts. *See Hawaii* v. *Trump*, 859 F.3d 741, 756 (9th Cir.), *judgment vacated*, 138 S. Ct. 377 (2017). With a wink and a nod, he made clear that the January Executive Order made good on his promise of a Muslim ban, even though the ban applied to immigration from majority-Muslim *countries*. *See* J.A. 124 (responding to the title of the order, "Protection of the Nation from Foreign Terrorist Entry into the United States," by stating, "We all know what that means"). The Executive Order ensured that non-Muslims from the affected countries would be given preferential treatment, clarifying any ambiguity about the President's intent. *See* January Order § 5. The January Executive Order directed the Secretary of Homeland Security, in consultation with additional government officials, to conduct a worldwide review of whether foreign governments could provide additional information that would suffice for the U.S. to determine an applicant is not a security threat and (if so) what additional information was needed for each

country. January Order § 2(a). After giving each country the opportunity to provide any necessary and sufficient additional information, the Secretary was to recommend a list of countries whose nationals should be included in a permanent travel ban. *Id.* § 2(e).

After a lower court preliminarily enjoined the first Executive Order, President Trump enacted a revised Muslim ban designed to evade judicial scrutiny. Like the January Executive Order, the March Executive Order required the Secretary of Homeland Security to engage in an analysis that would evaluate countries' citizens for inclusion in a future, permanent travel ban. March Order § 2. Several courts found the second Executive Order to likely be unlawful, some because of its anti-Muslim bias.

The President then enacted the Proclamation now under review. The face of the Proclamation claims that it is designed to "protect the security and interests of the United States and its people" and that it neutrally affects nationals of countries that "remain deficient . . . with respect to their identity-management and information-sharing capabilities, protocols, and practices." Proclamation 9645, 82 Fed. Reg. at 45,161. But Proclamation 9645 is more of the same: Presidential action that is designed to keep Muslims out of the United States because of their faith, despite being facially neutral toward religion. It indefinitely bans from entry into the United States immigrants who are nationals of six Muslim-majority nations (all but one of which had been covered by the earlier Executive Orders) and indefinitely limits non-immigrant entry by nationals of these countries—impacting tens of thousands of individuals from these nations on the theory that Muslims are dangerous. While, on its face, the Proclamation also affects

nationals of two non-Muslim-majority nations, Venezuela and North Korea, in practice, it excludes only a handful of individuals from those nations. *See id.* at 45,166. The government has refused to disclose whether Proclamation 9645 is materially inconsistent with the advice the President received from his advisors. *See* Letter from Sharon Swingle, U.S. Department of Justice, to Patricia S. Connor, Dkt. No. 126, *IRAP* v. *Trump*, No. 17-2231(L) (4th Cir. Nov. 24, 2017).

All the while, the President has continued to demonstrate personal animus against Muslims. On August 17, 2017, President Trump tweeted, "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" Linda Qui, *Study Pershing, Trump Said. But the Story Doesn't Add Up.*, N.Y. Times, Aug. 17, 2017 (hereinafter "*Study Pershing*").[7] This statement refers to the utterly false myth that General Pershing executed 49 out of 50 Muslim terrorists with bullets dipped in pigs' blood, leaving the fiftieth person alive to tell the tale. *Id.* And on November 17, 2017, the President re-tweeted three anti-Muslim propaganda videos, resulting in widespread condemnation from world leaders. Peter Barker & Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them*, N.Y. Times, Nov. 29, 2017 (hereinafter "*Trump Shares Videos*").[8]

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[7] *Available at* https://www.nytimes.com/2017/08/17/us/politics/trump-tweet-pershing-fact-check.html.

[8] *Available at* https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html.

The Court need not take the President at his (current) word that his primary motivation in enacting Proclamation 9645 was national security—and ignore the President's earlier statements that he intended to impose a travel ban on Muslims. Instead, the Court should determine whether that justification is pretext by relying on well-developed frameworks for unmasking unlawful discrimination underlying facially reasonable justifications. These frameworks, developed in cases involving jury selection, employment discrimination, and the free exercise of religion, confirm the district court's conclusion that the President's primary motivation in promulgating Proclamation 9645 was animus toward Muslims. Therefore, the Proclamation falls within the President's § 1182(f) power only if it can withstand strict scrutiny—which it does not.

Looking at motive would not prevent executive action under § 1182(f) that is primarily aimed at advancing national security interests, because such interests are indeed compelling. It surely must be the unusual case where executive action addressing national security interests is the product of religious animus and is not narrowly tailored to advance a compelling government interest. But the Court is presented with such an unusual case here.

ARGUMENT

I. SECTION 1182(F) DOES NOT PERMIT THE PRESIDENT TO INTENTIONALLY DISCRIMINATE AGAINST MUSLIMS.

Section 1182(f) allows the President to "suspend the entry of . . . any class of aliens as immigrants or nonimmigrants" after "find[ing] . . . that the entry . . . would be detrimental to the interests of the United States." However broad the face of this provision may be, RFRA prohibits the President from allowing hatred of Muslims to dictate immigration policy. Congress intended RFRA to apply with equal force to the President's power in the immigration arena, and RFRA prevents the President from applying any law in a way that substantially burdens belief in Islam, unless his action represents the least restrictive means of furthering some compelling governmental interest. Substantial burden can be presumed if the President was substantially motivated by religious animus when invoking § 1182(f), and the record here is replete with evidence of such a motive. Accordingly, on the extraordinary facts present here, RFRA requires analysis of the President's motives to determine whether the Proclamation is lawful.[9]

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[9] Respondents' Third Amended Complaint includes a claim based on RFRA's independent cause of action. J.A. 153-54. The district court did not evaluate whether Respondents were likely to succeed on the merits of their RFRA claim. If the Court determines that respondents are not entitled to preliminary relief for their Establishment Clause or INA causes of action, the Court should evaluate whether RFRA provides an alternative basis for affirming the decision below,

A. RFRA limits the scope of the President's § 1182(f) power.

RFRA limits the federal government's ability to "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1. Such action, even if supported by statute and facially religion-neutral, is valid only if it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

RFRA limits *all* federal statutes passed before its effective date; it prevents *any* government official from interpreting a statute or engaging in statutorily authorized action that could substantially burden religion, unless the action or interpretation can survive strict scrutiny. *Id.* § 2000bb-3. In other words, to the extent that § 1182(f) could be construed to impose a substantial burden on the exercise of religion in a manner that did not pass strict scrutiny, that construction is invalid.

Importantly, RFRA does not contain an exception for the immigration or national security arenas, or for the President; it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *Id.* Consequently, "[s]eemingly reasonable regulations based upon speculation [and] exaggerated fears of [sic] thoughtless policies cannot stand," even in contexts where the political branches are due considerable deference. H.R. Rep. No. 103-88, at 8 (1993) (explaining that RFRA applies even to the military context, where executive authority is at its

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or remand with instructions to consider the issue.

height); *accord* S. Rep. No. 103-111, at 8, 12 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897, 1901. Thus, Proclamation 9645 exceeds the President's § 1182(f) authority if it imposes a substantial burden on the exercise of religion in a manner that fails strict scrutiny.

B. Basing immigration policy on religious animus substantially burdens the free exercise of religion under RFRA.

Favoring belief in one religion over another implicates protections for the free exercise of religion, including RFRA. Holding a religious belief is a form of religious exercise—and an extraordinarily protected form at that. *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such."); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (explaining that the term "exercise of religion" within the meaning of RFRA involves religious belief that does not result in any additional action). Government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert*, 374 U.S. at 402; *see also* 42 U.S.C. § 2000bb (incorporating the *Sherbert* standard into RFRA). This is because government action adopted to discriminate against religious beliefs, almost without fail, will penalize belief in that religion. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 564 (1993) (striking down a "rare example of a law actually aimed at suppressing religious exercise" on Free Exercise Clause grounds); Brief of Scholars of Mormon History & Law as *Amici Curiae*, *Trump* v. *Int'l Refugee*

Assistance Project, Nos. 16-1436, 16-1540 (U.S. Aug. 17, 2017).

Because *Sherbert* and its progeny require courts to apply strict scrutiny to government action animated by animus toward a particular religious belief, 374 U.S. at 402, so too does RFRA. This approach is a product of history and of statute: In *Employment Division* v. *Smith*, 494 U.S. 872, 883-90 (1990), this Court substantially limited the application of *Sherbert*, holding that the Free Exercise Clause did not subject most facially neutral laws of general applicability to strict scrutiny. Congress enacted RFRA in direct response to *Smith* and applied statutory protections that mirrored the protections for free exercise set out in *Sherbert* and its progeny by specific reference. 42 U.S.C. § 2000bb. Thus, the Court has used the *Sherbert* line of Free Exercise Clause jurisprudence to determine whether government action substantially burdens the exercise of religion within the meaning of RFRA. *Hobby Lobby*, 134 S. Ct. at 2770.

Under *Lukumi* and *Sherbert*, government action based on animus toward believers in any particular faith so strongly suggests the imposition of a substantial burden that, if Proclamation 9645 was adopted to discriminate against Muslims, Respondents need to show little more (if anything) to demonstrate Proclamation 9645 imposes a substantial burden on them. Respondents are likely to make such a showing. One organizational respondent represents Muslim children who, under the Proclamation, "have expressed the desire to their parents to change their Muslim names, and to not wear head coverings, to avoid being victims of violence." J.A. 147. Individual respondents also allege significant burdens, including

being denigrated as a Muslim, facing limitations on the ability to serve as a religious leader, and being barred from freely associating with those of other faiths. J.A. 143-44. If proven, these allegations would surely suffice to demonstrate that Respondents are substantially burdened because they believe in (or are an organization serving individuals that believe in) Islam.

C. RFRA and the Establishment Clause both limit the President's § 1182(f) authority.

Undoubtedly, government action that privileges belief in one religion over another implicates the Establishment Clause as well as free exercise protections. *Hialeah*, 508 U.S. at 532 (courts have repeatedly held that government activity designed to "discriminate[] against some or all religious beliefs" violates the Establishment Clause). *Both* free exercise and anti-establishment jurisprudence "prevent the government from singling out specific religious sects for special benefits or burdens." Ronald Rotunda & John E. Nowak, 6 *Treatise on Constitutional Law-Substance & Procedure* § 21.1(a) (5th ed. 2017). Accordingly, ADC echoes Respondents' arguments that the Establishment Clause prevents the President from exercising § 1182(f) with the aim of disfavoring Islam. Moreover, the pretext analysis laid out in Part II may assist the Court in evaluating whether the Proclamation violates the Establishment Clause.

That said, RFRA requires courts to examine motive as part of their *statutory* analysis, not merely their *constitutional* analysis. Thus, even assuming arguendo that *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-70 (1972), precludes the Court from examining the President's motives as part of its *constitutional*

analysis,[10] *Mandel* plainly does not apply to the Court's *statutory* analysis. *Mandel* did not involve an application of § 1182(f) and was decided before RFRA was enacted.

II. RELIGIOUS ANIMUS SUBSTANTIALLY MOTIVATED PROCLAMATION 9645.

As courts have long recognized, discriminatory actions are often sheltered behind or intertwined with facially legal reasoning. Accordingly, courts have developed robust tools for determining whether a party's stated reason for acting masks an impermissible discriminatory motive, including in cases involving the free exercise of religion, jury selection, and employment. Here, where the President's extraordinary public statements cannot help but raise the specter of religious animus (and where RFRA narrows the deference ordinarily owed to the President in the immigration and national security arenas), those tools can aid the Court in evaluating whether the Proclamation is unlawful, despite the government's assertions that it was adopted solely to promote national security.

A. Well-developed tools can guide the Court in this case.

1. Jury Selection. When criminal defendants allege racial discrimination in prosecutors' use of peremptory strikes, courts evaluate prosecutors' proffered reasons for pretext as part of the *Batson* v. *Kentucky* framework. *Batson* v. *Kentucky*, 476 U.S. 79, 96

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[10] It does not. *Mandel* and other precedents requiring deference to the President's national security judgment do not bar an inquiry beyond the face of his justifications where, as in this case, there has been "an affirmative showing of bad faith." *Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015).

(1986). In a *Batson* challenge, the defendant must first produce evidence that gives rise to an inference of discrimination. *Id.* at 97. Once the *prima facie* case is established, the government must come forward with a neutral, non-discriminatory explanation for the strike. *Id.* at 97-98. The court then determines whether, in light of the prosecution's proffered reason, the defendant has nevertheless established purposeful discrimination. *Id.* at 98. *Batson*'s third step often turns on a pretext analysis. *See, e.g.*, *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003). In mixed motive cases—cases where a strike "has been exercised in part for a discriminatory purpose" and in part for a non-discriminatory purpose—a strike survives *Batson* step three only if the prosecutor persuasively demonstrates that "the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike." *Jones* v. *Plaster*, 57 F.3d 417, 420-21 (4th Cir. 1995). While a *Batson* analysis is deferential to the government, it "is not toothless in the face of . . . blatant" discrimination. *Kesser* v. *Cambra*, 465 F.3d 351, 358 (9th Cir. 2006).

2. Employment Discrimination. Allegations brought under employment discrimination statutes often include a pretext inquiry even in mixed-motive cases, where an employer allegedly engaged in adverse employment action "where both legitimate and illegitimate reasons motivated the decision." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 93 (2003). To succeed in such mixed-motive cases where pretext is alleged, the plaintiff must show that discrimination "was a substantial motivating factor" in the employer's decision to engage in adverse action. *Mereish* v. *Walker*, 359 F.3d 330, 339 (4th Cir. 2004).

Proof that an employer "would have taken the same action even absent" discriminatory intent serves as an affirmative defense. *Id.*

3. Free Exercise Clause. This Court has also evaluated pretext in the context of a Free Exercise Clause challenge to government action allegedly motivated by religious animus. In *Lukumi*, the Court held that "[f]acial neutrality" of government action "is not determinative" of whether it is designed to limit the free exercise of religion. 508 U.S. at 534. After noting that the text, history, and application of the challenged ordinance suggested discrimination on the basis of religious belief, the Court engaged in an independent analysis of whether the ordinance was adopted for a religiously neutral purpose. *Id.*

B. Religious animus impermissibly motivated Proclamation 9645.

In ferreting out discrimination in these areas, a few categories of evidence are especially probative of pretext. Courts have been particularly alert to:

(1) unexplained differences between the treatment of members of different groups;

(2) a lack of fit between the stated reasons for an action and that action's results; and

(3) an atmosphere of discrimination, based on past statements or actions.

Looking to those forms of evidence here, the inevitable conclusion is that animus towards Muslims substantially motivated Proclamation 9645.

1. Comparisons. Courts compare individuals or groups subject to a challenged action to those not affected in order to assess whether an unlawful motive hides behind a facially valid one. In the Free Exercise

context, a strong inference of discriminatory motive arises when the burden of governmental action "in practical terms, falls on adherents [of a particular religion] but almost no others" or the challenged government action exempts non-religiously motivated conduct. *Lukumi*, 508 U.S. at 536-37. In employment discrimination cases, such comparisons are "especially relevant" to a finding of pretext. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973). In the *Batson* context, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El* v. *Dretke*, 545 U.S. 231, 241 (2005); *see also Foster* v. *Chatman*, 136 S. Ct. 1737, 1750 (2016) (finding certain explanations "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered Garrett an unattractive juror").

Put simply, if a party claims to have a particular rationale for its actions, but then applies that rationale in a disparate manner based on race, gender, or religion, that strongly suggests that race, gender, or religion is the true basis for the party's actions. When no plausible explanation is offered for the disparate application, the inference of discrimination becomes stronger still. *Cockrell*, 537 U.S. at 345; *see also Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (characterizing "implausible or fantastic justifications" as "pretexts for purposeful discrimination").

The stated rationale for Proclamation 9645—alleviating the risk that a foreign government's vetting procedures will fail to identify a dangerous individual, 82 Fed. Reg. at 45,161—has quite clearly

been applied disparately, in a way that is nearly impossible to explain without reference to religion. Most of the nations covered by Proclamation 9645 are majority-Muslim. But more importantly for a religious discrimination analysis, *Lukumi*, 508 U.S. at 536-37, almost all of the *individuals* whose entry into the United States is affected are nationals of majority-Muslim nations.[11] The Proclamation affects roughly 65,000 nationals of majority-Muslim nations—every single national of six nations who seeks entry to the United States. *See* Kathryn Casteel & Andrea Jones-Rooy, *Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FiveThirtyEight, Sept. 28, 2017 (estimating the number of affected individuals).[12] Fewer than a hundred nationals of non-majority-Muslim nations are likely affected. *See id.* (estimating 61 affected individuals for North Korea and a small handful of specific individuals from Venezuela). In other words, an estimated 99.9 percent of people affected by the ban will be nationals of Muslim-majority nations.

This gross disparity might conceivably be justified if only governments of Muslim-majority countries had security and information-sharing problems. Or if entry from all non-Muslim-majority countries with security and information-sharing problems were rare. The Proclamation's treatment of Venezuelan nationals, however, shows that neither of these scenarios exists.

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[11] There are various ways to estimate the number of affected individuals, but all show that almost everyone affected is a national of a Muslim-majority nation. *See* First Cross-Appeal Br. for Respondents at 7.

[12] *Available at* https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban/.

A large and growing number of Venezuelan nationals seek to enter the United States. *See* Christopher Woody, *The Tipping Point: More And More Venezuelans Are Uprooting Their Lives To Escape Their Country's Crises*, Business Insider, Dec. 2, 2016.[13] The President concluded that "Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States." Proclamation 9645, 82 Fed. Reg. at 45, 166. Nonetheless, unlike similarly situated majority-Muslim nations, the Proclamation restricts entry only by "officials of government agencies of Venezuela involved in screening and vetting procedures" rather than all Venezuelan nationals. *Id.*

The Proclamation attempts to dismiss this disparity, stating "[t]here are . . . alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela." *Id.* But this leaves entirely unaddressed the Proclamation's own conclusions that Venezuela fails to satisfy at least one key risk criterion (i.e., that terrorist groups are active within Venezuela, *see* Bureau of Counterterrorism, *Country Reports on Terrorism 2016*, U.S. Dep't of State (2017),[14] and does not cooperate by taking back Venezuelans who have been deported from the United States. Proclamation 9645, 82 Fed. Reg. at 45,166. The President used these same factors to justify

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[13] *Available at* http://www.businessinsider.com/venezuela-migration-economic-political-crisis-2016-11.

[14] *Available at* https://www.state.gov/documents/organization/272488.pdf.

restricting entry by *any* citizen from Somalia and other heavily Muslim countries. *See id.* at 45,165, 45,167.

Indeed, comparing the Proclamation's treatment of Somalia to non-majority-Muslim nations is also telling. Somalia met the information-sharing requirements that the government applied to every other nation. J.A. 134-135. Nonetheless, the President deemed Somalia—and no other country—to present such a risk to national security that all Somalian nationals face severe restrictions on entry into the U.S. *Id.* The government provides no evidence that it engaged in the same type of analysis with respect to non-majority-Muslim nations that met the government's information-sharing requirements. The government's religion-neutral explanation for imposing a burden on a large group of individuals, 99.9 percent of whom come from Muslim-majority nations, simply does not add up.

2. Lack of Fit. The inference of discriminatory pretext becomes stronger still when a party's stated goal could be accomplished just as effectively without a disparate impact. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (explaining that evidence that an employment policy's goal could be accomplished without an "undesirable racial effect" demonstrates pretext); *Dretke*, 545 U.S. at 260 (examining the "fit" between prosecutors' stated reason for striking jurors and the actual impact on the jury pool). If a more efficient method exists to accomplish a stated goal, the natural question to ask is why someone chose the less efficient method. When ignoring efficiency creates clear disparate impact on members of a particular class, that question answers itself: the stated goal is a pretext for discrimination.

Restricting all nationals of six majority-Muslim nations and North Korea is not an effective way to combat terrorism. A Department of Homeland Security draft report, prepared about two weeks before the President's second Executive Order took effect, concluded that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." J.A. 358. Indeed, the biggest nationality-based predictor of someone committing a terrorist act on U.S. soil is *American* citizenship. *Id.* Yet the President directed the Department of Homeland Security to focus on citizenship when recommending which countries should be included in a permanent travel ban—recommendations that laid the basis for Proclamation 9645.

The point is not that the Proclamation constitutes bad policy or relies on questionable national security judgments. Rather, this evidence makes clear that the Proclamation's means do not match its stated ends. There is no "fit of fact and explanation." *Dretke*, 545 U.S. at 260. And when a party's stated explanation deviates so dramatically from clear facts, this Court often draws the obvious inference that the stated explanation is not really the main one.

That inference is even stronger when, as here, a different, discriminatory explanation leads to a "much tighter fit of fact and explanation." *Id.* Although the Proclamation does a poor job of preventing terrorist attacks on U.S. soil, it makes significant strides toward fulfilling a campaign promise to curtail the entry of Muslims into the United States.

3. Atmosphere of Discrimination. An atmosphere of discrimination also provides evidence of pretext. *See, e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 188 (1989), *abrogated on other statutory grounds*

("[P]etitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidence of respondent's past treatment of petitioner, including the instances of the racial harassment."); *Lukumi*, 508 U.S. at 539 (looking to the timing and circumstances surrounding an ordinance's passage when evaluating its constitutionality); *Cockrell*, 537 U.S. at 346-47 (explaining "historical evidence of racial discrimination" and a "culture [that] in the past was suffused with bias" tend "to erode the credibility of the prosecution's assertion that race was not a motivating factor," especially when the prosecution uses the same tactics that had previously been shown to be racially motivated). Repeated invidious statements by the President and his advisors evince just the sort of culture suffused with bias that warrants skepticism toward alleged explanations. Most prominently, for a long period of time during his presidential campaign, President Trump explicitly called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." J.A. 158. President Trump did not back down from these positions after Election Day. The text of the January Order echoed his campaign language about presumed hate and anti-American attitudes among Muslims that he had used in his original calls for a ban, alluding to stereotypes particularly commonly applied to Arab Muslims:

> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support

> the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

January Order § 10.

In referring to the title of the January Order, "Protection of the Nation from Foreign Terrorist Entry into the United States," President Trump stated, "We all know what that means." J.A. 124. The clear implication is that the January Order furthered President Trump's longstanding promise to implement a "shutdown of Muslims entering the United States." J.A. 130-131.

President Trump has never disavowed his earlier anti-Muslim and anti-Arab sentiments. To the contrary, President Trump reiterated his intent to "keep [his] campaign promises" despite negative judicial decisions regarding the legality of his first Executive Order. J.A. 127-128. Senior Policy Advisor to the President Stephen Miller, in discussing plans for a second Executive Order, explained that it would produce the "same basic policy outcome for the country," with "very technical" differences. J.A. 379. And after he had signed the March Order, President Trump described it in a major speech as "a watered-down version of the first [order]." J.A. 426.

The President's discriminatory statements continued through the time he signed Proclamation 9645, almost to this day. While awaiting

recommendations from his advisors, the President promised that his final travel ban, now embodied in Proclamation 9645, would impose a "much tougher version" of his earlier travel bans. J.A. 132-133. On August 17, 2017, President Trump tweeted, "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" *Study Pershing*. This statement refers to the utterly false myth that General Pershing executed 49 out of 50 Muslim terrorists with bullets dipped in pigs' blood, leaving the fiftieth person alive to tell the tale. *Id.* And on November 17, 2017, the President re-tweeted three anti-Muslim propaganda videos, resulting in widespread condemnation from world leaders. *See Trump Shares Inflammatory Anti-Muslim Videos*.

These statements provide strong evidence that religion "was on [President Trump's] mind[] when [he] considered" the Proclamation. *Dretke*, 545 U.S. at 266. This case presents the sort of atmosphere of discrimination that "tends to erode the credibility of" assertions that impermissible discrimination "was not a motivating factor." *Cockrell*, 537 U.S. at 346. Given President Trump's numerous, unequivocal statements focused on the threat of "hatred and danger" from Muslims, the reasons proffered for implementing Proclamation 9645 were, at the very most, secondary to religious animus. Accordingly, the President only has authority to promulgate it under § 1182(f) if the Proclamation sets forth the least restrictive means of furthering a compelling government interest. *See* 42 U.S.C. § 2000bb-1.

III. THE PROCLAMATION IS NOT THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENT INTEREST.

The government is unlikely to show that the Proclamation furthers a compelling government interest. Although the Proclamation is arguably narrowly tailored toward reducing the number of Muslims and Arabs entering the United States, the government has no compelling interest in discriminating against belief in Islam. Moreover, although national security is a compelling interest, the Proclamation is not narrowly tailored to advance national security; instead, focusing on entrants' nationality is at best a crude and ineffective proxy for the security risks they present. *See supra* Part II(B)(2). Therefore, the Proclamation is unlikely to survive the scrutiny required by § 1182(f) as limited by RFRA, and Respondents are likely to succeed on the merits of their claims.

CONCLUSION

The Court should uphold the Ninth Circuit's preliminary injunction.

Respectfully submitted,

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